IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 198

M. KRAUS & BROS., INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. The Government necessarily concedes (Bf., p. 27) that for petitioner corporation to have been guilty of the offenses charged in the Informations its conduct must have been evasive of the price ceilings for poultry, or that it must, at the least, have acted with evasive intent. The charge in each count is that petitioner corporation "unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5" by conditioning the sale of poultry upon the sale of poultry parts. The regulation thus alleged to have been violated is headed "Evasion". The acts specifically prohibited therein are not prohibited in, and of themselves, but only as methods of evasion. Certainly it is not intended to prohibit the charging of commissions or the making of charges for transportation or trade understandings. These are prohibited only as methods of evasion. Thus the *sine qua non* of the Govern-

ment's case is proof of evasion, or at least of intent to evade.*

The basic difference between the position of the Government and that of the petitioner corporation lies in their respective ideas of what constitutes an evasion of ceiling prices for poultry. The Government contends that the mere conditioning of the sale of poultry at ceiling prices upon the sale of poultry parts constitutes an evasion of the price ceilings for poultry, without respect to whether or not the purchaser of the poultry parts gets his money's worth. The petitioner, on the other hand, contends that it is incumbent upon the Government to prove that the combination sale is inflationary in character in that the purchaser of the poultry parts does not get his money's worth, i.e., that the price charged for the poultry parts is an artificial one, indicating that the sale thereof along with the poultry is a device to hide an above-ceiling charge. The fundamental basis for petitioner's contention is that combination sales of plentiful commodities along with scarce commodities are anti-inflationary in that they increase the supply of goods being purchased by whatever purchasing power is outstanding.

If petitioner's theory is accepted, it is plain that the Informations are insufficient, and must be dismissed, because they contain no allegation that the prices charged for the poultry parts were excessive, or that the purchasers did not get their money's worth, and the case was tried throughout on the theory that it was unnecessary to make or prove such an allegation. It is most important to note, however, that the acceptance of the Government's theory as to what constitutes evasion or evidences evasive intent no less imperatively demands the reversal of the convictions. This for the reason, as shown in our main brief, that the petitioner was peremptorily barred by the trial court from rebutting

* Under Sec. 2h of the Act established business practices such as combination sales cannot be interfered with except to prevent evasions.

the principal, if not the only, evidence relied upon by the Government to prove compulsion upon purchasers to buy poultry parts, i.e., the evidence that particular purchasers had gotten what appeared to be bad bargains due to their seeming inability to utilize the poultry parts.

The matter is very succinctly expressed in the dissenting opinion of Hincks, *J.*, wherein it is said (R. 277): "The judge must have overlooked the tendency of such evidence to negative an inference that the sales were made with evasive intent. It was admissible on that fundamental issue, and its exclusion was erroneous." As pointed out in our main brief, the evidence which petitioner vainly and persistently sought to introduce was as to the public demand for poultry parts. It was flatly refused the right to introduce such evidence, and was peremptorily directed not to call any witness to testify on the subject matter, although counsel had stated that he had many such witnesses prepared to go on the stand (R. 162-4).

Such evidence was equally relevant and material, whichever theory of evasion, the Government's or petitioner's, is to be considered correct. If the Government's theory be correct, then the evidence is squarely relevant and of the highest importance upon the issue of whether or not the purchasers willingly acquired the poultry parts. Indeed, almost the whole of the Government's case, if not the whole thereof, in proof of compulsion, had been based upon the evidence of the purchasers, who were its witnesses, as to the lack of utility of the poultry parts. If it was open to the Government to prove that the purchasers got bad bargains in buying the poultry parts, it was certainly open to petitioner to attempt to prove by its own witnesses that the purchasers got their money's worth.*

* The idea advanced by the Government (Bf., p. 34) that petitioner was obligated to re-summon witnesses after the trial court had flatly refused to hear them, and they had been excused, simply because thereafter a slight amount of evidence was received bearing upon the subject-matter they had been called to testify upon, displays a complete lack of knowledge as to the conditions attending a jury trial in a large city.

On the other hand, if petitioner's theory be correct, it is equally plain that the proffered evidence was relevant and material upon the issue as to the excessiveness *vel non* of the price charged for the poultry parts.

How obvious it is that petitioner was barred from making its defense by the rulings of the trial court, even assuming the correctness of the Government's theory, clearly appears from parts of the trial court's charge to the jury. He specifically asked the jury to consider (R. 241) "whether the prices at which they (the poultry parts) had been sold, *were entirely out of line with any value that attaches to them, so that the prices charged therefor would be almost entirely profit to defendants,* * * *". He told the jury that what the defendants "are charged with having done is imposing as a necessary condition of the purchase of turkeys the simultaneous purchase of chicken feet, skin or gizzards *that were utterly useless and valueless to the purchaser*". (Italics ours.) If ever an issue was tried upon the evidence of one side and not upon the evidence of the other, this is it.

The theory now advanced by the Government to the effect that the benefit* of making an additional sale raises the price charged for the poultry above the ceiling price, without respect to whether or not an excessive price was charged in the additional sale, was not at all the theory upon which the case was tried. As pointed out by the Government (Bf., p. 32), the trial court ruled, "The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores" (R. 162). That, says the Government, "was the trial judge's theory of the case" (Bf., p. 32). On that issue a great deal of evidence was received from the Government as to the worthlessness of the poultry parts. This theory excluded

* Plainly this so-called benefit cannot be measured in dollars and cents. Indeed, as may easily happen, when the additional goods are sold at a loss, it becomes a detriment.

the possibility of petitioner's rebutting by its own witnesses the prosecution's evidence as to lack of demand for poultry parts, and thereby deprived petitioner of the right to put in a defense. Thus the Government's present theory is purely academic as far as the trial of the case is concerned. Value of the poultry parts was a vital issue therein whether or not it ought to have been.

Little more need be said concerning the Government's argument on the first point. The District Court cases and the Municipal Court case which it cites (Bf., p. 29) are certainly not impressive authorities, to say the least. No Circuit Court of Appeals decision is cited. Only one of the lower court cases was even a criminal case, and in that (the *Armour* case) the decision was not after trial, but upon demurrer. In all of the cases, unlike ours, "tying agreements" were specifically prohibited in the regulation. They would seem to require no further discussion.

The Government also relies upon an alleged administrative interpretation of the meaning of the prohibition against "tying agreements" which are not specifically prohibited or even mentioned in our regulation. This obviously lacks significance since the question in our case is whether petitioner was guilty of evasive conduct or conduct with evasive intent, not whether its conduct comes within the definition of tying agreement. Certainly, in view of the complete lack of reference to "tying agreements" in the poultry regulation, petitioner could not have been expected to resort to the protest and review provisions of the Act in order to attack the propriety of an interpretation which on its face had no bearing on the particular regulation.

2. As pointed out in the majority opinion of the Circuit Court of Appeals (R. 272), the defendants relied in that court upon "failure of evidence to establish guilt". It is upon this ground, and not, as suggested by the Government

(Bf., p. 36), upon the erroneousness of an instruction to the jury that petitioner presses the argument here that a corporation cannot be convicted of wilfully violating the law when no knowledge and acquiescence or participation of any governing officer is shown.

In answering our basic argument, the Government suggests that the rule to be applied to corporate responsibility is different from that to be applied to the responsibility of natural persons for the acts of their agents, but does not suggest wherein it is different. In applying the strictly analogous rule forbidding the imputation to a principal, for the purpose of assessing punitive damages, of the wilfulness of an agent, this Court has, however, held directly to the contrary. *Lake Shore & Michigan Southern Ry. Co.* v. *Prentice*, 147 U. S. 101, at pages 109-111. When it is conceded, as we concede, that the participation of a governing officer may be charged to the corporation, it is plain that there is no reason whatsoever for distinguishing between corporate principals and natural principals, merely because of the fact that a corporation can act only through agents.

The Government's principal argument, however, is that the wilfulness required to be proved in the case at bar is nothing more than the intentional doing of an act, as distinguished from the doing of an act with evil purpose or criminal motive. This may or may not be true, but assuming *arguendo* that it is true, our argument is not in the least affected, for it is exactly as difficult to impute intentional action to a corporation by reason of the acts of its inferior agents, servants or employees, as it is to impute evil purpose or criminal intent, once it is admitted, as it now must be, that a corporation can be guilty of a crime involving evil purpose or criminal intent.

We have commented in our main brief on nearly all of the cases cited by the Government. Since *Egan* v. *U. S.*, 137 Fed. 2d 369 (C. C. A. 8th), certiorari denied, 320 U. S. 788, involved acts of the president of the company, aided and

abetted by other directors, vice presidents and important officers, it is an authority which is not in the least in conflict with our position. In *C. I. T. Corp. v. U. S.*, 150 F. 2d 85 (C. C. A. 9th), the court noted (p. 90) that the local manager, "pressed by his seniors to procure the (financial) statements", was "the primary agent of the corporation having the duty to determine whether financial statements of applicants for F.H.A. loans, which were to be passed on to the Administrator", were true or false. The *Illinois Central* and *Mousel* cases (Bf., pp. 42, 39) are cases in which the respective statutes imposed penalties for defaults in positive duties. They are clearly not in point.

As pointed out in our main brief, it is immaterial whether or not Nathan Lotto, so-called branch manager, participated in any of the allegedly conditioned sales. The Government attempts, nevertheless, to connect him with the Braverman sales. Braverman, however, had no difficulty in selling all of the chicken feet he bought (R. 88), and there is no other evidence that the sale to him of the poultry was conditioned upon the purchase of poultry parts. As for the remainder of the evidence relied upon to connect "responsible corporate officials" with the allegedly conditioned sales (Bf., pp. 41-42, foot-note 15) it is plainly entirely consistent with innocence, unless the mere fact that more than one salesman allegedly participated in what were on their face entirely legitimate sales is to condemn a corporation whose only governing officer charged with participation therein has been acquitted.

CONCLUSION

For the reasons stated it is respectfully submitted that the convictions should be reversed.

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